Due service and receipt of a copy of the within is hereby admitted this.....day of September, 1938.

.....

.....

.....

Attorneys for Respondents.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1938.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner,* vs. ELIZA R. P. CHRISTIAN, et al., *Respondent.*	No. 15
ELIZA R. P. CHRISTIAN, et al., *Petitioner,* vs. WAIALUA AGRICULTURAL COMPANY, LIMITED, *Respondent.*	No. 17

Reply Brief of Waialua Agricultural Company, Ltd.

HERMAN PHLEGER,
MAURICE E. HARRISON,
GARNER ANTHONY,
Counsel for
Waialua Agricultural Company, Ltd.

ROBERTSON, CASTLE AND ANTHONY,
Honolulu, Hawaii.

BROBECK, PHLEGER & HARRISON,
Crocker Building,
San Francisco, California,

EVAN HAYNES,
Of Counsel.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

TREATISES

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1938.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner,* vs. ELIZA R. P. CHRISTIAN, et al., *Respondent.*	No. 15
ELIZA R. P. CHRISTIAN, et al., *Petitioner,* vs. WAIALUA AGRICULTURAL COMPANY, LIMITED, *Respondent.*	No. 17

Reply Brief of Waialua Agricultural Company, Ltd.

The opening brief of Mrs. Christian is entitled in No. 15 and No. 17. We assume, therefore, that it is intended to be considered in both of those proceedings. We also assume, and request, that all our briefs be considered in both proceedings.

(Emphasis is supplied unless otherwise noted.)

Ostensibly the grantor's argument is directed to the errors urged in the cross-petition, i.e., that the Circuit Court of Appeals erred (a) in requiring a return of the purchase price; and (b) in remanding the cause for a trial on the issue of Mrs. Christian's competence in 1905 and 1906 when the lease and contract were made. In fact, however, the main burden of the argument is an attempt to sustain the decree below cancelling the deed of 1910, upon grounds other than those upon which the court placed it—grounds which that court, despite the strenuous insistence of counsel, did not adopt, and indeed rejected.

The only arguments made in support of the decree with respect to the lease of 1905 are a reiteration of the argument that an incompetent's conveyance is void, plus an argument (in the face of the express findings to the contrary made by all three courts below), that Waialua did not prove lack of knowledge of the incompetence.

The Circuit Court of Appeals Rejected the Contentions now urged by the Grantor as to the deed of 1910.

The Circuit Court of Appeals disposed of this cause by first determining the applicable law to be (a) that the deed of an incompetent is void; and (b) that it will be set aside as against an innocent purchaser upon restoration to status quo, which it defined as a restoration of the consideration plus an allowance for improvements. Having determined the applicable law, it then applied the law to the facts.

The court said, speaking of the deed of 1910:

> "Both courts found that appellant was incompetent to execute the deed; that the company had no notice of the incompetency; that the company could be placed in statu quo; and that appellant was not guilty of laches. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written considering the evidence. We accept them because we can not say there was clear error, since the evidence at most was only conflicting." (R. 1605)

The court thus specifically accepted the findings of both lower courts that Waialua had no notice of the incompetence and reached its decision by applying its view of the law to the facts as found. The court thus rejected in toto the contention of counsel that Waialua had notice, and held directly to the contrary. Nor did it accept or follow the arguments of the grantor's counsel which are here urged (a) that the consideration was inadequate, and (b) that Mrs. Christian did not receive it.

Indeed, when Waialua filed its petition for rehearing in the Circuit Court of Appeals, counsel for the grantor filed a reply again urging these contentions. The court, in denying the petition, said:

> "Fourth. Appellant (Mrs. Christian's guardian) has filed a reply to the petition stating he is contented with the decision as made, but that if a rehearing is granted, his contention that the company had notice of the ward's incompetency should be first considered. Our opinion was reached on the assumption that the company did

not have such notice. We treated it in that manner because both the court below and the trial court required restoration of the amount paid. This could not have been done under any theory of the law other than that the company did not have notice. Thus, both have made an implied finding that the company did not have notice. We cannot say that 'it is clear that their conclusion was erroneous'." (R. 1637)

It is clear from this statement that the Circuit Court of Appeals not only assumed that Waialua had no notice, but gave the question consideration, and affirmatively rejected the argument that Waialua did have notice.

The Supreme Court of Hawaii had made specific findings[1] on the question of notice, and it is evident that the term "notice" as used in the opinion of the Circuit Court of Appeals, was employed, not merely in the sense of "knowledge" but in the sense of "bona fides" as the term is customarily used in discussing questions of a bona fide purchase, i.e., not only lack of knowledge, but adequate consideration and good faith.[2]

---

1. The Supreme Court of Hawaii said:

"In the case at bar, as already held, while Eliza was an imbecile and mentally incompetent, the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910" (R. 555) and

"When the W. A. Co. received the deed of Annie Kentwell of May 2, 1910, it did so as we have already held without knowledge of the incompetence of Eliza (R. 575)."

2. As to "notice" in equity, see 34 Harv. L. Rev. 137; also Ames "Lectures on Legal History", p. 254 et seq.

It is important to observe that all three courts below believed, and expressly held, that, if Waialua took with knowledge of the incompetence, return of the consideration and restoration to status quo were unnecessary (R. 136-7, 274, 292-3, 1600, 1637). And all three courts required restoration of the consideration, and attempted to restore Waialua to status quo.

It is fair, therefore, to say that these arguments which counsel is urging "with all the earnestness at our command" were not only not accepted by the Circuit Court of Appeals, but were rejected by it as well. And they were also urged before all of the lower courts, which in every instance decreed the return of the purchase price, and held, either directly or by necessary implication, that Waialua had no notice. It seems absurd to suggest that courts would have devoted hundreds of pages to the discussion of controversial legal questions, when the entire case could have been disposed of by a simple finding of fact.

This would seem to dispose of the question, and we submit that the issues for consideration by this Court, are the errors of law of the Circuit Court of Appeals. We contend that their correct determination will entirely dispose of this cause.

Counsel in attempting to escape the effect of these rulings suggest that "It was not necessary for any of the three courts to find that Waialua had knowledge of the incompetency * * * It is a distasteful thing for a Trial Court in a small community, such as Honolulu, to find economically important people guilty of knowingly taking advantage of an incompe-

tent," and to clinch their argument they append a footnote to the effect that the population of Honolulu in 1910 "was only 52,183" (Brief p. 30).

This would seem to be the measurement of justice by population. The seeming accuracy of the measurement is delusive, however, for the trial was held, not in 1910, as noted by counsel, but in 1929. At that time the population of Honolulu was 137,582, not 52,183. Had counsel realized the population was so great, the suggestion probably would not have been made.

The Supreme Court of Hawaii, moreover, held that the lease of 1905 and the assignment of 1906 are valid and unassailable on the ground that in 1905 Waialua took the lease in good faith for adequate consideration without knowledge of the incompetence, and that in 1910 Waialua acquired an indefeasible title to the interest assigned by Mrs. Christian by the instrument of 1906, because by the deed of 1910 (to which Annie Kentwell was a party) Waialua purchased that interest from Annie Kentwell in good faith and without knowledge of Mrs. Christian's incompetence (R. 555, 575).

The Supreme Court of Hawaii, therefore, having reviewed the evidence fully and independently (a) expressly found in the passages quoted above in the footnote that Waialua took without knowledge of Mrs. Christian's incompetence, both in 1905 and 1910: (b) necessarily rested its decision on that finding in decreeing return of the consideration and in holding that status quo should be restored, and (c) necessarily rested its decision on that finding in upholding

as immune from attack the lease of 1905 and the interest purchased by Waialua from Annie Kentwell in and by the deed of 1910.

Nature of Arguments.

Counsel are asking this Court to find that attorneys now dead were engaged twenty-five years ago in an outright fraud. They are asking that it do this in a review of a decision of the Circuit Court of Appeals, which makes no such finding, and in the face of findings by the Supreme Court of Hawaii which are to the contrary. They ask this, moreover, on the basis of a review of fragmentary correspondence and the testimony of witnesses who, were found in the lower courts to be unworthy of belief.

Before answering the arguments advanced, it seems appropriate to recall the factual situations which bear upon these questions of fact that counsel ask this Court to decide.

Nature of the Evidence.

All of the questions of fact raised by Mrs. Christian relate to the negotiations in 1909 and 1910 culminating in the deed of May 2, 1910.

The evidence which this Court is asked to review in order to reach a finding that at this time Waialua had notice of the incompetence and acted unfairly, is oral and documentary.

Oral Testimony.

The oral testimony is that of James L. Holt and Mrs. Lawrence Kentwell.

It is to be recalled that the transaction in question consisted of (a) negotiations between James L. Holt and Lawrence Kentwell, as representative of Mrs. Christian, (b) negotiations between Waialua and James L. Holt, and (c) the final delivery to Mr. D. L. Withington, one of Waialua's attorneys, of the deed from Mrs. Christian et al. to James L. Holt; Waialua having advanced the consideration to be paid to Mrs. Christian.

Substantially all of the negotiations on behalf of Waialua, both written and oral, were conducted by Mr. D. L. Withington and Mr. W. R. Castle, its attorneys. At the time of the trial, Mr. Withington was dead and Mr. Castle was permanently incapacitated by illness and advanced age (R. 977). Mr. Lawrence Kentwell, who conducted all of the negotiations on behalf of Mrs. Christian, was not called as a witness. Mr. John F. Colburn, who acted at times for James L. Holt, was dead, as was John D. Holt, Mrs. Christian's father, who advised with her during the negotiations (R. 977).

James L. Holt. Counsel's principal contention is that Holt was Waialua's "agent", and that as he knew Mrs. Christian was incompetent, his knowledge is to be imputed to Waialua.

In support of this contention counsel rely chiefly on Holt's testimony, particularly as to the execution of the alleged agreement which they consider of such importance that they have set it forth in an appendix. They say (Brief p. 33) "Fortunately, we do have in

evidence the testimony of one of the parties thereto—Holt— * * * Since the defendant did not offer testimony to contradict that of Holt; we must assume that the arrangement was as outlined in the draft."

A reading of Holt's testimony (R. 1009-1027) can only lead to the conclusion that he is unworthy of belief.

In 1910, he had delivered to Waialua letters (R. 1353-1357) which he represented were written to him from Mrs. Christian, authorizing the sale (R. 1349). As stated by the Supreme Court of Hawaii,

> "If she was in fact the author of these letters they would afford very strong evidence of her mental competency. While by no means models of English composition * * * they indicate a reasonably sound mind—certainly a mind of sufficient maturity to execute a valid deed" (R. 267).

These letters were carefully copied by Waialua and, as the court said "The originals were returned to Holt and were apparently lost or destroyed" (R. 268). The Supreme Court of Hawaii concluded in the absence of the originals that it had not been demonstrated that these letters had been written by Mrs. Christian. Yet Holt testified "I would not say under oath that I did not write Mrs. Christian letters", and further "It may be possible that I did receive a couple of letters from her" (R. 1020) and "I said I probably did receive one or two letters from Eliza, * * *" and during this period there were letters purporting to come directly from Mrs. Christian to him (R. 1027).

Although Holt had delivered these letters to Waialua to show that Mrs. Christian desired to sell her property and had authorized Kentwell to act for her nevertheless he testified regarding Mrs. Christian "I know of my own knowledge that she was an imbecile from infancy, from the womb" (R. 1009). When cross-examined, James L. Holt was forced to admit that in the annulment proceedings in 1905 (wherein the court upheld the validity of the marriage against the claim of incompetence) he testified for the defendant, and he refused to deny that he then testified that Mrs. Christian was a bright girl or words to that effect (R. 1026). The record of testimony in this proceedings could not be found in the records of the local court (R. 1341).

The trial court expressly excluded from consideration the testimony of James L. Holt (R. 122) as not worthy of belief, and further held that "James L. Holt, Lawrence Kentwell, his wife, and John Dominis Holt did everything in their power to represent to the Waialua Company that Eliza was a competent and willing seller * * *" (R. 133). The Supreme Court of Hawaii did not even mention James L. Holt's testimony in its long opinions.

This is the witness of whom counsel say "Fortunately, we do have in evidence the testimony of one of the parties thereto—Holt—*. * *" (Brief p. 33); and further that his testimony must be true "Since the defendant did not offer testimony to contradict that of Holt * * *" (Brief p. 33). How could Waialua produce testimony to contradict that of Holt.

when all the other parties to the alleged agreement were dead?

Although he was the grantee named in Mrs. Christian's deed, and had conveyed this interest to Waialua by warranty deed, Holt, when named as a respondent in the suit, filed an answer confessing the bill (R. 50).

Mrs. Kentwell. Mrs. Christian's cousin, was the only other active participant in the transaction who testified. When asked embarrassing questions she replied "That was in 1910: remember this is 1928. That is very long ago, isn't it?" (R. 1190) and "I am under oath now and I don't know what really happened at the time" (R. 1191).

Mrs. Kentwell is Mrs. Christian's guardian in England and was instrumental in commencing this suit. After the first trial but before decree she appeared by Mrs. Christian's counsel and submitted herself "to the jurisdiction of the court" (R. 163). Later, when named as a respondent in this suit, she appeared by Mrs. Christian's attorneys (R. 783).

The trial court excluded Mrs. Kentwell's testimony from consideration (R. 122) and said that she was "substantially discredited in this court" as a witness (R. 159). It also found that she did everything in her power to represent to Waialua that Mrs. Christian was a competent and willing seller (R. 133). The Supreme Court of Hawaii said of her "This witness is greatly discredited * * *" (R. 275) and "Leaving out Annie Kentwell's testimony as being unreliable * * *" (R. 275).

As bearing upon the reliability of her testimony the following facts appear:

Mrs. Christian's interest was a contingent remainder in 1/3, dependent upon her surviving her father, John D. Holt, and being his sole heir.

By agreement executed before the American Consul in London, on June 12, 1918 (8 years after Mrs. Christian had sold her interest) John D. Holt adopted the six minor children of Mrs. Kentwell with "all rights and privileges as if they were his own natural children with the right and privilege" of inheriting from him as his natural heirs at law. By this agreement Mrs. Kentwell released to Mr. Holt all parental control and rights over her children (R. 1360).

On March 23, 1923, Mrs. Kentwell wrote to an attorney in Honolulu:

> "By the way, have you thought over the fact that Uncle adopted the children before he made his will and before the new law in Honolulu over adoption came into use, so a solicitor told me he couldn't see how Judge Banks could decide in that way and that I should write to my husband about it. I am only sorry I was not there to see it for I am sure there is a loophole somewhere. Both the Waianae people & Waialua people were anxious to have it settled this way because they had bought Eliza's interest on speculation & if they had decided that uncle's adoption of the children were legal, then it meant they had a share to the estate & Eliza's interest had diminished. Besides the children were adopted before the American Consul & Uncle was an Ameri-

can citizen, still we'll see what Lawrence says" (R. 1198).

The Supreme Court of Hawaii, in discussing the contingent nature of Mrs. Christian's interest pointed out that even though she survived her father, her interest might be cut down because "it was not beyond the range of probability he would adopt children who under the law would also become his heirs. Even therefore, if Eliza (Christian) survived him there might be other heirs with whom the fee simple estate would have to be shared.[1] In this event Eliza's interest would be correspondingly diminished, and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with the Hawaiian Statute" (R. 305).

It was only because of a failure to comply with the law in the adoption proceeding, that Mrs. Kentwell's children did not succeed to 6/7 of the interest which Waialua purchased, leaving it but 1/7. Mrs. Kentwell's scheme failed by a narrow margin.

On July 22, 1923, Mrs. Kentwell wrote to Honolulu stating that Mrs. Christian had informed her that she had sent a wire to Honolulu advising that she had executed a power of attorney and requesting that money be forwarded to her (R. 1197).

---

1. Professor John C. Gray's opinion, obtained by Mr. Withington before he left for England, was in error in this respect (R. 931).

On March 23, 1923, Mrs. Kentwell wrote to an attorney in Honolulu telling of Mrs. Christian's "wonderful memory. She remembers every date more so than I do R. 1198).

On May 23, 1923, Mrs. Kentwell wrote to Honolulu referring to a discussion she had had with Mrs. Christian about securities (R. 1200).

On August 22, 1923, Mrs. Kentwell wrote to Honolulu that she just came across a will[1] of Mrs. Christian executed by her before witnesses (R. 1200).

Mrs. Kentwell testified that Mrs. Christian was incompetent at all times. When confronted with these letters she said that she had previously made and written false statements concerning the mental competency of Mrs. Christian but that

> "now that I am obliged to give my statements under oath, I must say what is correct and true. The reason why I wrote these letters containing these statements that they did contain knowing these statements not to be true, was because I was hoping that Mr. Smith would use the letters to show to the Hawaiian Trust Company * * *" (R. 1199).

In June 1926, Mrs. Kentwell was appointed Mrs. Christian's guardian in England.

It seems reasonable to infer from these facts that Mrs. Kentwell believed in 1910 and for many years

---

1. This will was drawn by Judge Frank Andrade, a former Circuit Court judge in Honolulu. Although demanded (R. 75), it was not produced. Judge Andrade was absent from the jurisdiction during the trial (R. 977).

thereafter that Mrs. Christian was competent to sell her property, and that it was only after her attempt to obtain 6/7 of Mrs. Christian's interest (despite its previous sale to Waialua) for her children by having them adopted by Mrs. Christian's father, that she conceived the possibility of having Mrs. Christian set aside the deed to Waialua on the ground of incompetence. Certainly there is no other logical explanation for the adoption, or for her letter of March 23, 19[illegible], or for her delay for years, to take action.

Lawrence Kentwell. Lawrence Kentwell was Mrs. Kentwell's husband. Mrs. Christian lived in his household from 1903 on. In Honolulu he was the president of the Hawaiian Realty & Maturity Company, Limited. The Supreme Court of Hawaii considered him "a man of considerable business experience and an educated lawyer" (R. 302).

In 1905 he attended Columbia University Law School and finished his course when the family lived in Elizabeth, New Jersey in 1906, receiving an LLB degree. In 1912 he received a B.A. degree from Oxford University in law; later he attended Kings College in Cambridge for two years, entered Middle Temple and was called to the bar in 1916 (R. 1189).

Counsel in their brief (p. 4) state, "Lawrence Kentwell abandoned his family in 1919" citing page 847 of the record as authority for this declaration. The statement on that page is "Lawrence Kentwell went to Shanghai, China, in 1919, and has remained there since". If this is an attempt to suggest

> come before this court with any intent or desire in any way to besmirch the name of Mr. David L. Withington. We agree that he was a man of estimable character. The only charge in this case is the mistake that was made in this instance, as is apt to be made by the best of us." (R. 276)

The testimony shows that Mr. Withington, born in 1854 in Newburyport, Massachusetts, was graduated from Harvard University in 1874, being a member of Phi Beta Kappa. He was graduated from Boston University Law School in 1876, cum laude. He practiced law in Massachusetts until 1887, when he removed to California on account of his wife's health. He practiced there until 1903, being a member of the State Senate. In 1903 he came to Hawaii where he practiced until his death. He was President of the Bar Association of Hawaii and conducted at least fifteen cases before this Court (R. 1235-7).

That Mr. Withington was a careful and painstaking lawyer is revealed by his cables, by his consultation with Professor Gray (R. 928-933), and by his letter of May 19, 1910, giving a detailed report of the transaction (R. 944). It is inconceivable that Mr. Withington, if he had the slightest question as to Mrs. Christian's competence (and he saw and talked with her at least twice, before she signed the deed) would have advised insuring her life, or would either have paid over the money or permitted his client to go forward with the expenditure of hundreds of thousands of dollars on the faith of the integrity of the deed.

Consider the importance of Mr. Withington's testimony in this case. But he was not here to defend either his client or his own honor.[1]

John L. Colburn. John L. Colburn, who acted for James L. Holt, died before the trial (R. 977).

Of the principal actors, all of Waialua's representatives were dead or permanently incapacitated from testifying. Of those who acted for Mrs. Christian, two appeared and both were found unworthy of belief. Altogether twenty-two persons, whose testimony would be valuable, are either dead or otherwise unavailable at the time of trial (R. 977).

Documentary Evidence.

It is sought to sustain a claim that Waialua did not act in good faith in 1910, and that James L. Holt was its "agent", largely on the basis of certain cablegrams and letters which then passed. Principal reliance is had, however, on an unsigned copy of a purported agreement dated April 15, 1910, which is printed as an appendix to Mrs. Christian's brief.

These documents are discussed as though they were written yesterday, instead of more than 28 years ago, and by them it is sought to show that Waialua's representatives were guilty of bad faith.

---

1. The Supreme Court of Hawaii said:
"Of course, if Withington, knowing of her incompetency, had taken the deed from her notwithstanding, it would have been a highly dishonorable and unprofessional act and thoroughly inconsistent with the character and reputation which he is shown by the evidence to have possessed" (R. 276).

Not a single original paper, letter or document was produced in behalf of the grantor, or by James L. Holt or Mrs. Kentwell. Mrs. Christian's original letters are missing and although both received many important communications bearing on the transaction not a single one was produced.

Mrs. Kentwell testified that she turned a number of letters dealing with the transaction over to her counsel (R. 1189) but, although their production was demanded, none were produced.

The charge that Waialua acted unfairly in the negotiations of 1910 is claimed to be shown by excerpts from the correspondence between James L. Holt and Mrs. Kentwell's husband. The record contains seven communications passing between Holt and Kentwell during the negotiations leading up to the deed of 1910. These refer to six others passing between the same parties, all of which are missing. Five of those missing were from Holt to Kentwell, and one from Kentwell to Holt (See R. 906, 913, 915, 919). It is reasonable to infer that others also are missing, although not referred to specifically in those present in the record.

The only document produced by James L. Holt, Mrs. Kentwell or Mrs. Christian or their counsel was the unsigned draft of the alleged agreement of April 15, 1910, upon which such stress is laid. Counsel say that "although Waialua was asked for the original of this agreement 'somehow' this very important document could not be located" (Brief, p. 33). It was not produced for the obvious reason that it was never

executed. James L. Holt testified that it was executed in triplicate originals "one to Colburn, one to me and one to Castle" (R. 1012). He could not produce his original, or Colburn's original, but he did produce an unsigned copy of a preliminary draft. The only reasonable conclusion is that no such agreement was ever executed. The attempt to base an "unanswerable argument in this case" (to use counsel's own words) upon its alleged execution proved by the testimony of a discredited witness, where the other parties are in their graves, is, we submit, asking too much of a court of equity.

All of the documentary evidence, consisting of letters and cablegrams during 1909 relating to the transaction, were produced from the files of Castle & Withington, attorneys for Waialua, and from Waialua's own files (R. 905). All these, with the exception of the letters between the law partners themselves and Mr. Castle's correspondence directly with James L. Holt and Mr. Colburn, which would naturally be in these files, had been delivered to the attorneys for Waialua by James L. Holt at the time of the transaction in order to convince it that he had a contract with Mrs. Christian (R. 905, 1015, 1349-1359).

In short, all the documentary evidence on which it is now sought to fasten a charge of fraud was voluntarily produced by Waialua's counsel. No claim of privilege of attorney and client, the parol evidence rule, or other objection was raised.

The series of letters and cablegrams of more than 28 years ago, are in some cases originals, in other cases

copies. Some are fragmentary, some are not clear or understandable. The acts and motives set up as constituting the charge of fraud are sought to be shown by strained inferences from what appears in these documents although they refer to 16 other letters or cables which are missing, and which if available might greatly change the apparent meaning of those which are produced. They constitute slender evidence indeed upon which to ask this Court to make a finding 28 years after the event, that admittedly honorable men, now dead, committed a fraud—all for the purpose of sustaining a decree of the Circuit Court of Appeals on grounds not relied upon by it.

ARGUMENT IN REPLY.

For convenience, the various arguments advanced in the brief of the grantor's counsel will be dealt with under the same topic headings, and in the same order in which they there appear.

(A) THE GRANTOR'S CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ABUNDANTLY SUPPORTED BY THE AUTHORITIES IS NOT VALID.

As already noted, this argument is addressed, not to the points raised in the grantor's cross petition for certiorari, but to the arguments raised in our petition.

(1) The grantor's contention that incompetents are entitled to set aside their deeds on making restitution, does not correctly state the law.

It is first asserted that "the decision of the Circuit Court of Appeals follows the rule obtaining through-

but the American courts, that even assuming the good faith of the other contracting party and the adequacy of the consideration, an incompetent may set aside a contract upon restoring such party to status quo."

To this we reply (a) that the Circuit Court of Appeals did not follow the rule just stated; and (b) that the rule just stated is not the rule which "obtains throughout the American courts", and is not the rule which should govern this cause.

The Circuit Court of Appeals held that the deed of an incompetent is void, and that restoration to status quo means returning the consideration, and making an allowance for improvements upon a quasi contract basis. This we assert is a rule not supported by authority or principle. The court not only followed the wrong rule, but misconceived the meaning of status quo, and hence misapplied it.

In the second place, the statement of counsel that the rule "obtaining throughout the American courts", is that the contract of an incompetent will be set aside as against an innocent purchaser if status quo can be restored, is not accurate. As set forth in 46 *A. L. R.* 419 (supplemented in 95 *A. L. R.* 1442):

> "The great weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position."

Counsel has reversed the rule mentioned and gives restoration to status quo as an affirmative ground for relief when the rule merely gives inability to restore status quo as a ground for denying relief. Many of the cases cited in counsel's footnote are of this character,[1]

As shown in our brief, the better rule is that contracts of incompetents are valid if made with an innocent purchaser. This rule prevails in England, and has been announced by the courts of last resort in at least ten states. We submit it is the better view, and should be applied here.

We will not stop to labor the question either of the inaccuracy of counsel's statement concerning the prevailing rule, or the merits of the rule last mentioned, since in this case, as abundantly shown, status quo cannot be restored, and a choice between these rules is, in the last analysis, unnecessary.

Status quo cannot be restored.

In our opening brief we have discussed at length the countless changes of position made and suffered

---

1. An examination of the many cases cited in counsel's footnote on page 15 discloses that most of them merely state that the deed of an incompetent will not be set aside as against an innocent purchaser, if status quo cannot be restored and not that it will be set aside if status quo can be restored. Still others involve cases in which the defendant had actual notice, and others involve requiring an incompetent mortgagor to repay a loan as a condition to cancellation. Still others have been modified or overruled by later decisions in the same jurisdiction. Few involve deeds.

by Waialua by virtue of which, we believe, it is apparent that Waialua cannot be restored to status under any interpretation of the rule; and that cancellation of the instrument sought to be annulled would work a grave and inexcusable injustice upon the innocent grantee. We shall not repeat that discussion.

Grantor's counsel has cited 20 cases in support of the proposition that Waialua can be restored to status quo. Of these 14 were cases of fraud, 2 of duress, and 3 of breach of contract. Only two involved incompetents, and of these two, one was a case in which the consideration was found to have been "grossly inadequate".

In citing these cases, counsel confuses two quite distinct matters, namely, (a) the rule that a plaintiff who seeks to rescind must return whatever he received, and (b) the rule that, quite apart from return of the consideration, rescission will be denied as against a defendant who acted in good faith, if he has so changed his position in reliance on the transaction as to make cancellation inequitable.

All of the twenty cases in question deal with the first of these rules, namely, the rule requiring return of the consideration. They simply illustrate one or the other of the well recognized exceptions to or qualifications of that rule, e. g.: that minor defects in the consideration returned will be ignored; or that where the defendant was guilty of actual fraud, return of the consideration will be partially or sometimes wholly excused, if the inability to return it can be attributed to the fraud itself; or that deterioration of

the consideration returned due to inherent defects therein will not be taken account of. For a list of these exceptions see *Restatement of the Law of Restitution,* Sec. 65; *Restatement of the Law of Contracts,* Sec. 349.

It is worthy of note that the Circuit Court of Appeals, after basing its decision that status quo could be restored, on the conclusions of the lower courts to that effect, proceeded to repudiate entirely the basis upon which the Supreme Court of Hawaii had reached its conclusion. How great this departure is, is shown by comparing the decrees of the two courts. To restore status quo, the Supreme Court of Hawaii (a) upheld the 1905 lease, (b) upheld the 1906 contract and decreed that Waialua would not be required to pay rent during the remainder of Mrs. Christian's life, (c) required the outright conveyance to Waialua of the land upon which all improvements *since 1905* were situated, and (d) the return of the purchase price. The Circuit Court of Appeals only required (a) the return of the purchase price, and (b) compensation for improvements placed on the land *after 1910*. It decreed that the 1905 lease and 1906 contract should be cancelled if Mrs. Christian was then incompetent, although both instruments were upheld by the Supreme Court of Hawaii. It is perfectly obvious that the two courts had vastly different views as to what constituted restoration to status quo. The Supreme Court of Hawaii strongly intimates that it would not have cancelled the 1910 deed had it not considered the 1906 contract to be a valid transfer of rents for the period of Mrs. Christian's life (R. 572).

A status of tenancy in common will not protect Waialua on its improvements.

It has been suggested that status quo in so far as improvements are concerned is automatically restored by cancellation of the deed, because Mrs. Christian will become a tenant in common with Waialua, and as Waialua has already tenants in common owning 2/27, it will only mean that it will have an additional tenant in common owning 1/3—or tenants in common owning 11/27 instead of 2/27. This view was taken by the Supreme Court on the first appeal but was expressly overruled by the Supreme Court of Hawaii on its second appeal (R. 578), which held that its earlier decision was in error; for the court had there failed to give consideration to improvements off the Holt lands in reliance on the deed, saying "in any event the fact remains that the existence of these costly improvements away from the Holt lands was not considered in the former opinion with reference to its effect on the issue of restoration to status quo" (R. 579).

The court also agreed "that such relief as the Waialua Agricultural Company is entitled to * * * should be afforded it in this suit and not left to consideration and treatment in a future partition suit" (R. 579), thus definitely overruling the contention.

It is obvious that the status quo as to improvements (and this is but one of the many factors involved) could not be restored by making Mrs. Christian a co-tenant with Waialua. While at present it is a co-tenant with the owners of a 2/27 interest, that is a

very different thing from being a co-tenant with the holders of an 11/27 interest. For all that appears, Waialua holds a lease on the 2/27 interest of very long duration under which it retains title to such improvements. Many other reasons could be advanced in answer to this contention, including (a) Waialua has never been a co-tenant of Mrs. Christian, and a decree making her a co-tenant would not be to restore the condition which existed before the deed was delivered; (b) the co-tenancy could only relate back to 1922, whereas the deed was delivered in 1910, and hundreds of thousands of dollars of improvements were made before 1922; (c) there is no way of telling in advance what views a court of equity might entertain in partition proceedings, and a court in such proceedings would have to consider equities hereafter arising as well as present equities; (d) restoring status quo is certainly not satisfied by remitting the innocent grantee to another forum or to another action to secure its rights; (e) it is questionable whether a co-tenant who is also a lessee is entitled to compensation for improvements made during the term of the lease; (f) a future possible partition is not adequate because the measure of compensation to a co-tenant for improvements is not the value of such improvements but only the enhanced value of the land resulting therefrom; (g) the risk of doubtful questions of law which will arise in partition proceedings should not be thrown on Waialua; (h) a partition proceeding will not take into consideration improvements upon the property which inure to the benefit of other lands;

improvements abandoned to make the lease to the Hawaiian Pineapple Company; improvements located on other lands for the benefit of the Holt lands; or improvements constructed in aid of Waialua's business; (i) the nuisance value that would attach to Mrs. Christian's interest as a tenant in common in a part of Waialua's integrated plantation is too obvious for argument. Finally equity requires that all controversies between the parties be settled in this suit. Restoration to status quo is a condition precedent to cancellation, not a condition subsequent. Here status quo obviously cannot be restored by remitting Waialua to the risks and uncertainties of the position of co-tenant followed inevitably by partition proceedings.

Here, in short, the fact that cancellation would make tenants in common of the parties adds to the already overwhelming array of circumstances by virtue of which Waialua's reliance on its title through many years makes it impossible to set that title aside without great and irreparable harm.

1905 lease and 1906 contract.

As pointed out in our opening brief (p. 95) an application of correct principles of law to the question of the deed of 1910 will dispose of the necessity of considering the validity of the lease of 1905 and the contract of 1906. In discussing the 1905 lease counsel again confuse return of the consideration, with restoration of status quo, for they argue that Waialua paid

that Lawrence Kentwell was not a responsible and honest adviser of Mrs. Christian, it is entirely without foundation.

Mrs. Kentwell testified in her deposition taken on November 5, 1928, that "I am not living with Mr. Kentwell now, because he is away; there is no separation or any trouble, but he has not been able to return" (R. 1184). On May 23, 1923, she wrote that Mr. Kentwell was forwarding her £150 a month through the London Branch of the Guaranty Trust Company (R. 1200). As of the time of her deposition (1928) she testified that her husband was sending her money every month by check through the Bank in London (R. 1181). She further testified "* * * I trusted him implicitly" (R. 1173). "I had implicit faith in my husband. He attended to all business transactions * * * and if he did attend to it, it was quite all right" (R. 1186). "If the money was paid to my husband it would be quite all right" (R. 1187). "He was, I think, careful in his business affairs and decidedly truthful" (R. 1189).

Kentwell was not produced as a witness nor was his deposition taken.

It is impossible to read the correspondence between Holt and Kentwell or the testimony without concluding that Lawrence Kentwell was an honest and faithful representative of Mrs. Christian. Certainly there is no foundation in the record for an inference to the contrary.

Testimony not Available.

The representatives of Waialua in the transaction were its attorneys David L. Withington and W. R. Castle, members of the firm of Castle and Withington, of Honolulu.

W. R. Castle. W. R. Castle was so physically incapacitated that it was impossible to take his testimony, and he has since died.

David L. Withington. David L. Withington, who proceeded to London and supervised the execution and payment for the deed, died in 1919 (R. 1235). In the original petition, Mr. Withington was directly charged with having misrepresented himself as Holt's attorney, of misrepresenting the value of the property and of having actual knowledge that Mrs. Christian was incompetent (R. 10, 11). Mrs. Kentwell testified that she had told Mr. Withington that Mrs. Christian was "Non compos mentis" (R. 1177). This was the basis on which the cause was tried—a direct charge that Mr. Withington had actual knowledge. But the trial court rejected Mrs. Kentwell's testimony as unreliable, and found that it had not been shown that Waialua had knowledge (R. 158). The Supreme Court of Hawaii held after a careful review of the evidence and "leaving out Annie Kentwell's testimony as unreliable" (R. 275) that Mr. Withington saw nothing to cause him to suspect that Mrs. Christian was "not of normal mind" (R. 276), and quoted the statement of her counsel made at the trial:

> "I want to add my personal commendation of the remarks of witness, and to say that we do not

and conclusively answered by the decision of the Supreme Court of Hawaii (R. 304-308) which found that the consideration was adequate measured by (a) its market value, (b) other offers, and (c) prior sales of interests in the same lands. It went further and demonstrated that the basis of valuation used by the trial court (mortality tables) was improper, and necessarily led to an erroneous conclusion.

Counsel attempt to minimize the conclusive effect of this finding by urging that the Supreme Court of Hawaii valued Mrs. Christian's interest on the basis that it had been diminished in value by the 1906 contract, which it had construed as an assignment of rents for life, and that since the Circuit Court of Appeals held that the 1906 contract assigned only the rents under the 1905 lease, the valuation by the Supreme Court of Hawaii was therefore in error.

The shortest answer to this contention is the simple fact that the Supreme Court of Hawaii did no such thing. Its explicit and detailed finding that the consideration for the deed of 1910 was adequate is contained in its first opinion rendered April 18, 1931 (R. 304-308). At that time the lease of 1905 and the assignment of 1906 were not involved in the proceeding at all. The Supreme Court of Hawaii in this same (first) opinion said in this connection:

> "Whether the instrument of 1906 should be set aside because of Eliza Christian's mental incompetency is not within the issues presented by the pleadings." (R. 323).

Earlier in this (its first) opinion it had refused to decide the question whether the assignment was void because not signed by Mrs. Christian's husband on the express ground that in any event it was valid as the assignment of Mrs. Christian's contingent right to receive rents under the lease of 1905 saying:

> "This contention may be passed without decision for the reason that, assuming the instrument to be void as a conveyance of an interest in land, it is nevertheless valid as an assignment of rents." (R. 321)

It is apparent from the decision itself that the Supreme Court of Hawaii in finding that the consideration was adequate, did not take account at all of the fact that Mrs. Christian had assigned her contingent right to rents (R. 304-308).

We submit that the consideration was fully adequate as was found by the Supreme Court of Hawaii, and that counsel's attempt to have this Court reverse this finding of fact is without merit.

(3) The Grantor's contention that Waialua was purchasing an expectancy, and she may set aside the transaction because the consideration was inadequate and there was unfair dealing, is not supported by the facts or the law.

In the first place, Mrs. Christian's interest was not an "expectant interest" within the meaning of the

authorities cited by counsel.[1] While it was a contingent remainder, it was a present estate that could be conveyed by deed, as Professor Gray[2] advised Mr. Withington (R. 931), and it was so conveyed by the 1910 deed in which Mrs. Christian was joined by her father and her cousin, and in a transaction in which she was represented by her attorney.

In the second place, as has been just pointed out, the consideration paid Mrs. Christian was fully adequate as was found by the Supreme Court of Hawaii.

In the third place, Waialua was not guilty of any inequitable conduct. We submit that it is unfair to charge that dead men of admittedly estimable character were guilty of sharp dealing in 1910, upon the basis of fragmentary correspondence only a portion of which is quoted, and the testimony of a discredited witness.

There was no Secret Profit.

Much is made of the statement of the trial court that Waialua "knew that James L. Holt was securing

---

(1) *3 Simes, Law of Future Interests*, p. 166, reads:

"While no consideration is required for the transfer of future interests *inter vivos*, one occasionally finds traces of an early English doctrine to the effect that equity will set aside the transfer if the consideration is inadequate. * * * It is believed that in so far as concerns future interests, no such doctrine is in force in most jurisdictions in this country."

(2) Professor Gray pointed out that Mrs. Christian's interest was a contingent remainder that could be conveyed or released by an ordinary deed.

a secret profit to himself and Colburn." As pointed out in our opening brief there was no profit, secret or other, and the error of the trial court in making this statement is understandable because, as found by the Supreme Court of Hawaii, the trial court erroneously believed that the price paid Mrs. Christian was inadequate, when in fact it was adequate.[1]

The trial court, apportioning the purchase price on the basis of mortality tables, computed the value of one life estate as approximately $18,000, and of Mrs. Christian's remainder as approximately $42,000. The Supreme Court of Hawaii repudiated the trial court's entire method of valuing the interest, and held that Mrs. Christian's interest was worth at most, $30,000 (R. 304). The fundamental ground therefore, on the basis of which the trial court concluded that Holt made a profit out of the purchase of Mrs. Christian's interest and its resale to Waialua, was rejected by the Supreme Court of Hawaii.

As against the suggestions of counsel, we point to the following: James L. Holt (who did not hesitate to stultify himself in other respects) did not testify that there was any profit, or any sharp dealing; Kentwell, who is argued to have been imposed upon,

1. On this issue, as on every issue of fact in the case, the hearing in the Supreme Court of Hawaii was, in effect, a trial de novo. It is a striking fact that nowhere in either of the court's long opinions does it rely on any of the trial court's findings of fact. The Supreme Court of Hawaii plainly assumed the duty, as it frequently does, of reviewing the evidence and reaching its own conclusions on all questions of fact as well as law (R. 208).

was not produced as a witness, and in the many years since the deed was delivered, he never made such a claim; the deed of Holt to Castle showing the total price on its face was publicly recorded in Honolulu within less than a month after the transaction (R. 38); the terms of the transaction were well known to the "competing" purchaser, L. L. McCandless (R. 935); the price at which Holt was offering his interest (R. 923) alone was exactly the same price that he received for it, after he had, by purchasing Mrs. Christian's interest, combined it with his own. Nor was this contention advanced by the grantor before the trial court.

That the trial court placed little weight on this phase of the case is shown by the fact that although it made the statement mentioned above, it considered that this was not a sufficient ground for cancelling the deed, if the price paid was adequate (R. 149). It was the erroneous view of the trial court as to the adequacy of the consideration, that furnished the basis of its decision, and not the claimed unfair dealing of Waialua, as to which the trial court was equally in error.

The insinuation that advantage was taken of the lack of funds of Mrs. Christian and the Kentwells is without foundation in fact. Mrs. Christian's father had an annuity of $1800 per year; she was assured of support for life by the contract of 1906; and she and the Kentwells traveled extensively for years and maintained a home and servants at Oxford. The

Kentwell's daughter Alice was educated in St. Hughes College, Oxford (R. 1089).

Counsel lay great stress upon the words "price to Waialua must be kept secret" which appears in the cablegram from Mr. Castle to Mr. Withington in London. This cablegram, quoted from frequently in the briefs of Mrs. Christian, read in full as follows:

> "Eliza and John D. accept $30,000. Must be inclusive of prospective interest. Annie Kentwell wants $5,000 her interest. Make less if possible. Must not exceed $35,000. Price to Waialua must be kept secret." (R. 934)

The cablegram in question is entirely consistent with perfectly honest motives in both the sender and the receiver. In the first place, we submit, the language of the cablegram shows that the last sentence relates only to the question of the price to be paid to Mrs. Kentwell, and has no bearing on the price to be paid to Mrs. Christian. As the first sentence of the cablegram shows, the price for Mrs. Christian's interest was fixed (which it was) by Holt's acceptance in his cablegram of April 12th, of the offer to sell her interest for that price (R. 926). As the cablegram further shows, the sender of the cable understood that the price to be paid to Mrs. Kentwell was still not fixed. This was Holt's understanding as well (R. 1019).

This being true, the direction to Mr. Withington not to disclose the price to be paid by Waialua for the two-thirds interest had reference only to the

unsettled question of the price to be paid to Mrs. Kentwell. In addition to the fact that the sum actually paid Mrs. Kentwell was the amount she asked, and there was in fact no reduction, there is no need to discuss the fairness of the circumstances surrounding the purchase of Mrs. Kentwell's interest, since the Supreme Court of Hawaii expressly held that Waialua was a bona fide purchaser for value of that interest (R. 572-575).

Independently of the foregoing, it is difficult to see upon what basis it could be held that Waialua's attorney was under any duty to disclose the price to be paid by Waialua for the two-thirds interest to be purchased by it from James L. Holt.

Indeed, the most probable explanation of the language in the cablegram is that Mr. Castle believed that it would be a breach of professional confidence for Mr. Withington to discuss in any way his knowledge of the negotiations between Waialua and Holt, which knowledge had been acquired by Mr. Withington while acting as attorney for Waialua. Moreover, Mr. Castle may well have felt that in agreeing with James L. Holt to take delivery of the deed on Holt's behalf, he and Mr. Withington were, in doing so, acting as representatives and attorneys of James L. Holt; and that this being true, they had no right to disclose their knowledge concerning his negotiations with Waialua.

It will, of course, never be known what was in Mr. Castle's mind when he sent this cablegram. Neither he nor Mr. Withington can tell us. It would be a violation of universally accepted principles to hold that

it is proper, after the lapse of the many years that have passed, to find on the basis of this isolated sentence in an incomplete series of communications, that Mr. Castle was assisting James L. Holt in the commission of a fraud by the latter, which neither he nor anyone else has testified was committed in fact.

Counsel suggest that James L. Holt's statement in a letter to Kentwell that Waialua contemplated a partition of the property constituted an unfair action on the part of Waialua. (R. 915) At the trial, W. W. Goodale, the only living officer of Waialua who would have knowledge of such a matter, testified definitely that he had never heard of such a suggestion. (R. 1256) Having in mind that the purchase-price at which Mrs. Christian's interest was finally sold, represented the amount that she asked and not the amount which she was offered, and that the property was offered not alone to James L. Holt but also to McCandless at this figure, it seems obvious that this statement in Holt's letter had no influence in the fixing of the purchase price. It is suggested that Waialua knew of Holt's statement because a copy of Holt's letter was delivered to the law clerk in Castle & Withington's office who examined the abstract (R. 143). We submit that this is too slender a thread upon which to predicate a charge of unfair dealing.

Waialua acted in good faith throughout.

At the outset of the negotiations which culminated in the delivery of the 1910 deed, Waialua was the owner of a 7/27ths undivided interest in fee simple

and held a lease of the entire property, which had twenty-one years yet to run. James L. Holt was the owner of a life estate in 1/3 and the contingent remainder in that 1/3, and he was also the owner of a life estate in the remaining 1/3. The contingent remainder in that 1/3 was owned by Mrs. Christian, subject to the 1906 contract.

Mrs. Christian, acting through her attorney, had been trying as far back as 1908 to sell her contingent interest and was offering it to various persons (R. 1018). James L. Holt had wanted to purchase it himself (which is of course entirely inconsistent with any belief on his part that Mrs. Christian was incompetent (R. 1018)), but was unable to do so for lack of funds (R. 908).

Waialua during all this time was unwilling to purchase James L. Holt's interest, which he and Colburn were offering for sale to it (R. 910, 912).

With the matter in this situation, Kentwell brought a prospective purchaser into the field, Mr. L. L. McCandless, by offering to sell him Mrs. Christian's interest for $30,000 (R. 1205). McCandless was known to be unfriendly to Waialua (R. 919). With this information, James L. Holt approached Waialua and was able to induce it to agree to enter negotiations with him to purchase his interest and that of Mrs. Christian, Holt representing to them that Mrs. Christian had offered to sell her interest for $30,000.

On March 8, 1910, Kentwell made a definite offer to James L. Holt of Mrs. Christian's interest, for

$30,000 in cash (R. 915). This offer was accepted by Holt's telegram of April 12th to Kentwell, which Kentwell confirmed by his telegram to Holt of the same day (R. 926).

This acceptance was spurred on by Kentwell's mention in his letter of March 30th to Holt that another prospective purchaser, McCandless, was in the field and had offered "a better proposition" (R. 919). The fact is that no better proposition was offered by McCandless as the Supreme Court of Hawaii found (R. 306). McCandless himself testified that he was offered Mrs. Christian's interest for this amount by Kentwell (R. 1205).

It was under these circumstances that, at the suggestion of Holt (R. 917), Mr. Withington, Mr. Castle's law partner, who was then in Boston, was requested to proceed to England to receive the deed and pay the purchase price.

The terms of James L. Holt's purchase of Mrs. Christian's interest were well known to McCandless (R. 922), and as his representative was reported to be on the way to England to purchase Mrs. Christian's interest, it is but natural that Mr. Withington was requested to proceed to England without delay. Also, as James L. Holt already had a contract covering the purchase of Mrs. Christian's interest for the definite sum of $30,000, it is obvious that Mr. Withington's task had nothing whatever to do with further negotiations with her.

Summarizing the foregoing, it can be said with certainty, notwithstanding the fragmentary state of

the evidence, that the following vital circumstances were present in these negotiations:

1. In 1910 Waialua already had a secure title to the lands for the next twenty years under the lease of 1905;

2. James L. Holt was anxious to sell his interest;

3. Mrs. Christian was desirous of selling her interest for $30,000, and it had been definitely offered for this amount to Holt on March 8, 1910 (R. 915) prior to the entry of Waialua in the transaction who up to that date had done nothing except reject offers;

4. Waialua had no desire to purchase any of these interests at this time, because of the fact that the most it could get from Holt and Mrs. Christian was an interest subject to future contingencies;

5. Waialua was finally induced to make this purchase because Kentwell introduced an allegedly competing purchaser (McCandless), unfriendly to Waialua, to whom Mrs. Christian's interest was offered at the same price.

6. When Mr. Withington went to London James L. Holt already had a definite contract for the purchase of Mrs. Christian's interest for $30,000, and nothing remained but for Mr. Withington to pay over the purchase price and receive the deed.

The following facts and factors are entitled to great weight, in considering the good faith of this transaction:

1. Mrs. Christian was adequately represented. The negotiations on her side were conducted by Lawrence Kentwell, who is described by the Supreme Court of Hawaii as "a man of considerable business experience and an educated lawyer" (R. 302). As we have seen, there is not the slightest ground upon which even to guess that he was not a faithful and energetic counsel. Throughout the negotiations, Mrs. Christian advised with Lawrence Kentwell, and with her father, John D. Holt. Although her father was given to drink from time to time, there is no suggestion that he lacked normal affection for his daughter or the solicitude for her welfare that would ordinarily be expected. He was considered a proper parent by Mrs. Kentwell, who in 1918 relinquished to him all parental control of her six children and agreed that he would become their adoptive parent (R. 1360).

2. Mrs. Christian had been living with her father and the Kentwells for years; and the relation was expected to continue. It is to be assumed that the whole family group wanted Mrs. Christian to get as good a price for her interest as possible, and there is no suggestion that this is not true.

3. Waialua's interest in acquiring Mrs. Christian's contingent remainder was not to acquire it as such, but to avoid the risk of having this con-

nothing to Mrs. Christian hence "there is nothing to be restored": and "The term of the lease of 1906 has expired" (Br. p. 22) giving no consideration to the many expenditures, and changes of position, of Waialua in reliance on the lease. That the term of the 25-year lease has expired, we submit shows that status quo cannot be restored. How can the parties, to use counsel's own expression, be put back to "substantially the position occupied before the transaction"? The transaction was in 1905, when the land was a barren waste. Suit was not brought until 1928 when the land was highly improved due to the expenditures of Waialua.

As to the argument that Waialua paid nothing to Mrs. Christian so there is nothing to return—this is answered by the fact that the rental of $3000 payable under the lease (if the 1910 deed were to be set aside) was by virtue of the 1906 contract, assigned to Mrs. Kentwell, who the Supreme Court of Hawaii found paid Mrs. Christian an adequate consideration therefor (R. 569-571), and Mrs. Kentwell had conveyed her interest to Waialua who is found to be a bona fide purchaser without notice (R. 575). It is also answered by the findings of both the Supreme Court of Hawaii (R. 558) and the Circuit Court of Appeals (R. 1609) that there was valuable consideration moving from Waialua to Mrs. Christian for the execution of the lease.

The cancellation of the lease would make a 25-year lease into a 17-year lease, one which the parties did not make, and which Waialua would have refused to

make (R. 1485). This, a court of equity will refuse to do; see:

Okill v. Whittaker, 2 Phillips 338;
Goin v. Cincinatti Realty Co., 200 Fed. 252, 254.

The Supreme Court of Hawaii's reasons for refusing cancellation of the lease are an effective answer to counsel's contention (R. 558-560).

As to the 1906 contract, no attempt was made to restore Waialua to status quo. The Circuit Court of Appeals clearly erred in reversing the decision of the Supreme Court of Hawaii that this instrument is valid and should not be set aside (R. 568-575). Grantor's counsel suggest that Waialua has not complained of the action of the Circuit Court of Appeal in construing the 1906 contract as merely an assignment of rents under the 1905 lease, thus reversing the Supreme Court of Hawaii which held the 1906 contract valid as an assignment of rentals during Mrs. Christian's life. Counsel is in error as point 5 page 16 of Waialua's Petition is addressed to this error.

(2) The Grantor's contention that the consideration was not adequate, is directly contrary to the finding of the Supreme Court of Hawaii.

Grantor's counsel ask this Court to find as a fact that the consideration was not adequate, although the Supreme Court of Hawaii held directly to the contrary, and although the Circuit Court of Appeals decided the cause on the basis of the Hawaiian court's finding. This argument, we submit, is effectively

2. On remand the trial court interpreted its own decision and that of the Supreme Court of Hawaii as finding that Waialua had no notice, and the trial was conducted on that basis (R. 1479).

3. Contrary to counsel's contention, the burden of proof was not on Waialua.[1]

4. The grantor alleged notice, assumed the burden of proof in the lower courts and the trial was had on this basis. The question cannot be raised on appeal. 22 C. J. 70; 3 C. J. 736; 4 C. J. 715. The grantor not only failed to sustain this burden, but the contrary was found, which finding is abundantly supported by the evidence.

5. The issue of notice was actually tried below, and findings made thereon. In such a case, particularly in an equity case, the question of burden of proof will be deemed immaterial on appeal. 4 C. J. 660; *Bank v. Western Union Telegraph Co.*, 141 Fed. 522, 528; *New York Life Insurance Co. v. Rees*, 19 F.(2d) 781, 787.

6. Where the parties and the court unite in trying a case on a particular theory, that theory cannot be rejected before the appellate court. *San Juan Light Co. v. Requena*, 224 U. S. 89.

---

1. Cases to this effect are found in our opening brief p. 105, to which many, including the following, may be added:

Rubins v. Hamnett, 294 Pa. 295;
Atlanta Banking Co. v. Johnson, 179 Ga. 313;
First National Life Ins. Co. v. Ryg, 209 Ia. 330;
Imperial Loan Co. v. Stone, L. R. (1892) 1 Q. B. 599.

7. The decision of the Supreme Court of Hawaii upholding the 1905 lease and the 1906 contract, (the latter on the ground that Waialua was a bona fide purchaser for value thereof by the deed of 1910) establishes Waialua's status as an innocent purchaser in good faith without knowledge of the incompetence.

(2) The Grantor's attempt to charge Waialua with notice on the ground that Holt was its "agent", failed in the court below, and is not sustained by the facts or the law.

This argument of counsel advanced "with all the earnestness at our (their) command" is deemed by them "an unanswerable point in this case", i.e. that although Waialua had no actual notice of the incompetence, it is to be charged with James L. Holt's knowledge because (so it is claimed) he was Waialua's agent, notwithstanding the trial court held that Holt did everything in his "power to represent to the Waialua Company that Eliza was a competent and willing seller" (R. 133). This contention was strenuously urged by counsel in the court below, not only when the appeal was first considered, but on rehearing. With minor difference the argument was presented in its briefs before that court word for word as it is urged here. It was not accepted by the court below, which indeed in its opinion denying rehearing, specifically rejected it, pointing out that the two lower courts had also held Waialua had no notice (R. 1637).

It should also be observed that counsel do not start this argument by any attempt to prove the "agency" by reference to the transcript. The relationship is as-

sumed to exist and having sowed the seed of the conclusion in the premise by assuming the existence of an agency, an apparently logical argument is tendered upon the application of the fiction of the law of agency that the knowledge of the "agent" is "presumed" to be the knowledge of the principal; and that Waialua, although it had no knowledge in fact, should be treated as though it did have knowledge. The struggle of the courts in attempting to rationalize this fiction was aptly stated by Mr. Justice Holmes (*Collected Legal Papers, Agency,* 101):

> "* * * the whole outline of the law, as it stands to-day, is the resultant of a conflict between logic and good sense—the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust."

The statements in cross-petitioner's brief "The findings are that Waialua purchased the property through an agent, James L. Holt." (Br., p. 13) and that "Waialua made the bargain through its agent" (Br., p. 31), and other similar statements contained in the brief, are merely counsel's contentions. No witness (not even the discredited Holt) testified that Holt was Waialua's agent and no court found that Holt was Waialua's agent.

Counsel attempt to sustain this claim by quotations from the fragmentary correspondence, and by a claim that a certain agreement was executed, although the agreement was not produced and the only testimony that such an agreement was executed, is that of a dis-

credited witness. How easy it is to make such an assertion and out of the numerous communications, extract quotations which seem to give it color. But it is equally easy to draw directly opposite conclusions, and indeed before the Supreme Court of Hawaii counsel not only did not contend that Holt was Waialua's agent, but claimed that Waialua was Holt's agent. That that court attached no significance to Holt's participation in the transaction is demonstrated by the fact that his name is not mentioned in either of that court's lengthy opinions.

What counsel here are trying to do, is to convict Waialua of fraud, not by proving that it committed a fraud, but that its "agent" did. If they were trying to prove that Waialua (through its admittedly honest representatives) committed a fraud, would be required to prove that fact by clear and convincing evidence. Every intendment and presumption would be to the contrary. But here counsel in their attempt to prove Waialua guilty of fraud, ask this Court to sit as a trial court and to find the essential fact upon which the claim is based, i.e. that Holt was Waialua's agent, by evidence of the most unsubstantial character. We submit that proof of agency is lacking, and that the facts upon which counsel rely, not only do not prove an agency, but show that no agency existed.

In answer to the grantor's contention, we will show that James L. Holt was not Waialua's agent and that the rule of agency contended for is not applicable here.

Before we pass from the subject of proof, we point out certain inaccuracies or omissions in counsel's factual discussion, which, in the absence of comment, might prove misleading.

1. On page 32, counsel state that Waialua in 1910 "set out to acquire the incompetent's share". As already shown, Waialua, until the introduction by Kentwell of an unfriendly buyer, refused to purchase either James L. Holt's or Mrs. Christian's share, and for years had refused to purchase a contingency.

2. On the same page, counsel make a partial quotation from Waialua's answer, intended to suggest that Waialua admitted that Holt was its agent. A reading of the answer (R. 64-71) demonstrates that such a suggestion is unfounded.

3. On page 34, much is made of Holt's comment in a letter, that Waialua will resort to a suit in partition, the intimation being that this was used by Holt to induce Mrs. Christian to sell. As already pointed out, Mr. Goodale, the only living officer of Waialua who would have knowledge, testified that he never heard of such a suggestion. Nor do counsel mention that in the very same letter, from which counsel quote, Holt points out that if Mrs. Christian does not sell and survives her father, she may get more for her share (R. 914), nor is mention made that Mrs. Christian's interest at the same time is being offered for sale to another prospective purchaser at the same price.

4. On page 35 (repeated on page 39) counsel state that Kentwell wrote Holt stating that McCandless

had made a better offer, without pointing out that this statement was untrue, and that as found by the Supreme Court of Hawaii (R. 306) and as testified to by McCandless (R. 1205) the terms offered to McCandless were identical with those offered to Holt, and McCandless never made a higher offer, or indeed any offer.

5. On page 38 counsel state that Professor Gray advised Mr. Withington that children who might be adopted by Mrs. Christian's father would not take under the terms of the Holt will, without pointing out that the law of Hawaii is settled to the contrary, and that not only will adopted children take, but that Mrs. Christian's father did later attempt to adopt Mrs. Kentwell's six children and this failed only because the formalities were not complied with (R. 305).

6. On page 44, counsel state that the question of agency is settled by a stipulation by Waialua's counsel. This is simply not true. Counsel quote in support of their statement from page 1061, as follows:

> "'Counsel for Waialua then admitted that the purchase of May 2, 1910 was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Exh. A-21).' (R. 1061)"

Not only is this a partial quotation, but the fact that it is partial is not indicated. The full quotation is:

"Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the Respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21), the court ruling as follows:

> 'I understand they are not seeking to aid their position now by any series of transfers to Waialua after 1910. They are willing to abide by the evidence of the status as to what construction should be put on the 1910 transaction as if direct to Waialua at that time.'"

A reading of the record shows that the stipulation had nothing whatever to do with the question of agency (as should be obvious, because counsel never urged such a claim at the trial), but was made by Waialua's counsel to facilitate the trial. Mrs. Christian's deed was to Holt, and Holt deeded to Castle. In later years Castle deeded to Helemano Real Estate Trust, which finally deeded to Waialua. Counsel for Waialua merely agreed that it would not be claimed that these numerous subsequent transfers put it in any better position than if the deed had been directly to it.

The April 15 Agreement Was Never Executed.

The argument of agency is predicated almost entirely upon an unexecuted draft of a proposed agreement dated April 15, 1910 (R. 948) between Holt, Colburn and Castle. We submit that the alleged agreement was never executed.

Counsel say: "It was demanded by the plaintiff, but although a great many papers having to do with this rather involved transaction were available and introduced in evidence *somehow* this very important document could not be located, and we must rely therefore upon secondary evidence of its contents to determine the real relationship between Waialua and Holt. Fortunately we do have in evidence the testimony of one of the parties thereto, Holt, that the final agreement was substantially in accord with a draft thereof which was prepared by Waialua's attorneys. * * * Since the defendant did not offer testimony to contradict that of Holt, we must assume that the arrangement was as outlined in the draft." (Brief, p. 33)

It is not strange that Waialua did not produce a document which was never executed. Holt said it was executed in triplicate "* * * one to Colburn, and one to me and one to Mr. Castle." (R. 1012) No explanation is offered why Holt did not have his original, but did have an unsigned preliminary draft; or why Colburn's copy was not produced. Indeed, this unsigned draft is the only paper produced by the grantor in the entire trial, all of the others (mostly copies) having been produced from the files of Waialua's attorneys.

Holt testified that the document was a preliminary phase and that "The agreement of April 15, 1910, was signed the last part of April, 1910, I think, and to the best of my recollection it was signed before May 2, 1910." (R. 1016)

This is slender evidence to prove the execution of a lost document, allegedly executed 19 years before the testimony of a partisan witness, whom the trial court found to be "substantially discredited"; whom the trial court found did everything in his power to represent that Mrs. Christian was competent; and whose testimony was not even mentioned in either decision by the Supreme Court of Hawaii.

Nor was it possible for Waialua to produce witnesses to contradict Holt, for all the other parties were dead.

Holt was not Waialua's Agent.

Obviously the alleged agreement had not been executed by April 25, 1910, for on that day Colburn wrote to Mr. Castle saying that he would not execute it (R. 937), Holt having written on April 21 (R. 947) "* * * that said instrument should have no force or effect whatsoever and should be held to be an uncompleted instrument, never having taken effect.

This notice is given to save my rights and to avoid all misunderstanding as to the paper above referred to pending *further negotiations* with you as to the sale of the lands in question." (R. 948)

On April 25, Colburn was still *offering to sell*, not only James L. Holt's interest, but Mrs. Christian's interest combined with it "viz. 18/27 of the Holt lands at Waialua". (R. 938)

On April 28 Holt wrote McCandless notifying him that on April 12, he had contracted to purchase Mrs. Christian's interest, and that this contract was then being closed in England (R. 939).

Holt on April 12 had a contract of sale—many days before he wrote to Waialua on April 21 that he would not execute the alleged agreement of April 15—"pending further *negotiations* with you as to the sale of the lands in question" (R. 948), and while Holt and Colburn were still offering to sell Mr. Castle the two-thirds interest (including Mrs. Christian's interest which Holt had already contracted to buy on April 12).

Can it be said that on that date Holt was Waialua's agent? If so, agent for what? Agent to negotiate with Mrs. Christian? Obviously not, for he had already contracted to buy her interest. Instead of being Waialua's "agent", he was actually on that date negotiating (to use his own words) with Waialua as to terms of sale, and Colburn on April 25 was doing the same thing, both making clear that they already had contracted to purchase but were not bound to sell to Waialua.

We submit that no agreement was ever reached between Holt, Colburn and Castle until Holt and Colburn executed and delivered their deed to Mr. Castle on May 28, 1910 (R. 960). Only after Holt and Colburn's deed was recorded, was Mr. Castle willing to record the May 2 deed, running as it did to Holt, it being recorded on June 23, probably after the Holt and Colburn deed had been returned from recordation. The May 2 deed had been forwarded to San Francisco where it was executed by Albert Christian on May 16, 1910. In the ordinary course it would be received in Honolulu within 10 days, which would

time its arrival as just prior to the date on which Holt and Colburn executed their deed..

Holt testified that when he signed the deed to Mr. Castle, he had never seen the deed of May 2, 1910. (R. 1015) The reason for this is obvious. Waialua had advanced to Holt the purchase price for the deed of May 2 without having a contract with Holt and Colburn for the purchase of the 2/3. It would not deliver the deed to Holt (or record it, which was the same thing) until after Holt had made his deed and it had been recorded.

At all times Waialua's position was merely that of a possible purchaser, who, because of the calculated introduction of McCandless as a competitive purchaser, had been induced to advance money in the expectation of being able at a later day to purchase the 2/3.

Holt was an Independent Actor.

While Waialua was desirous of acquiring the Holt lands, as evidenced by its purchases of undivided fee interests in 1899 and 1900 and later in 1905-1907, it is equally clear that it would not buy the 2/3 interests in which there were contingent remainders. Until the very last, it refused to make such a purchase, until finally, through the intentional introduction by Kentwell of McCandless, as a competitive buyer, it was induced to recede from its position.

While it is clear that Waialua was unwilling to purchase the 2/3 contingent interests, it is equally clear that Holt had for many years endeavored to ac-

quire them. As far back as May 18, 1893, he purchased the contingent interest of his brother (R. 849); on March 16, 1901, he purchased his father's life estate (R. 850); on July 1, 1902, he purchased the life estate of John D. Holt (R. 851). This made him the owner of the life estates in the 2/3, and the owner of the remainder in 1/2—the only remaining outstanding interest in the 2/3 being the contingent remainder of Mrs. Christian. Holt testified that when he had acquired these interests in 1902, Colburn had tried to sell them but without success (R. 1017).

On August 23, 1905 Colburn tried to sell the property to Waialua, but as Waialua insisted on a fee simple, the sale was not made (R. 981). Holt testified further:

> "I first undertook the purchase of the Eliza Christian interest in the Holt lands in 1909 * * * In the first place I was anxious to sell my own interest, and when I heard about the McCandless deal, trying to buy Eliza's interests, I went to Castle and told him the circumstances." (R. 1010).
>
> "I don't remember any efforts to sell the property covered by the deed of trust until 1909. I knew at the time (March 31, 1909, Ex. D-3) that Mr. Colburn offered to sell the property to Waialua.
>
> "At that time I was trying to acquire the Eliza Christian interest for myself, and I wrote a letter to Mr. Castle to that effect, trying to help raise some money. I tried to acquire her interest for myself from that time on until the final consum-

tingent remainder outstanding if it purchased from James L. Holt his two-thirds interest in the property which was complete except for Mrs. Christian's outstanding contingent remainder in one-third. Waialua had no direct interest in the amount to be paid for Mrs. Christian's contingent remainder since, if it had any actual agreement with James L. Holt for the purchase of these interests (which we submit is not shown) prior to the closing of the transaction, that agreement was that the amount to be paid for Mrs. Christian's interest should be deducted from the price agreed to be paid by Waialua for Holt's entire interest including this contingent remainder.

4. Waialua, upon acquiring James L. Holt's interest, including Mrs. Christian's, became substantially the sole owner of the lands in question, which it was in the process of incorporating into its much larger plantation, the whole enterprise involving the expenditure of enormous sums. It is opposed to all natural expectations to suppose that in these circumstances Waialua would consent to or participate in a petty fraud upon one of its grantors of a part interest in the property: or that it would have proceeded to expend hundreds of thousands of dollars, if it had had the slightest doubt of the validity of the conveyance.

5. Waialua's attorneys, who represented it in the transaction, were honorable men of the highest standing. It is unthinkable that they would have themselves taken part in, or would have

permitted Waialua to take part in, any overreaching of Mrs. Christian by Holt concerning this interest in the property which it was acquiring.

We submit that a consideration of the foregoing facts and circumstances leads inevitably to the conclusion that Waialua acted in the highest of good faith throughout this entire transaction.

(B) THE CONTENTION THAT THE DECISION SHOULD HAVE GRANTED MRS. CHRISTIAN GREATER RELIEF, IS WITHOUT MERIT.

Inasmuch as this argument, though addressed to an attempt to secure even a greater measure of relief than was given by the decree (which required the return of the consideration and an allowance for improvements, as a condition of cancellation), goes directly to the merits of the entire issue, we will deal with it at greater length than otherwise would be the case.

(1) The Courts found that Waialua was an innocent purchaser, and the Grantor's argument to the contrary is unsupported.

This argument has been anticipated and is fully met in our opening brief pages 104-106, so we will not discuss it other than to point out:

1. The courts below found that Waialua did not have notice (Supreme Court of Hawaii R. 275-276; Circuit Court of Appeals R. 1605).

The agreement shows that Holt and Colburn represented to Mr. Castle that because of ownership and contract they were in a position to sell a full 2/3 interest to Waialua but were in need of funds to complete the contract. They agreed that if Mr. Castle would advance the funds to complete the contract they would sell the entire 2/3 to him for a stipulated sum. As hereafter shown, Holt testified that this was the proper construction of the relationship.

Holt did not Know or Believe in 1910 that Mrs. Christian was Incompetent.

The knowledge that is sought to be imputed to the principal is knowledge of incompetence. The alleged incompetence was not adjudicated until 1929, more than 19 years after the transaction was completed. Whether or not Mrs. Christian was incompetent in 1910 is a matter of opinion, not knowledge, upon which a large number of witnesses disagreed. The only class of witnesses that were in accord were lawyers and public officials. They were all of the opinion that Mrs. Christian was competent. Counsel would have us believe that the opinion of an alleged agent conveniently given while acting as a discredited adverse witness, in the face of disagreement among the medical profession, and in the face of his own prior, contemporaneous, contradictory testimony, is knowledge of the fact of incompetence which will be imputed to the principal.

That cannot be the rule in a court of equity, particularly where the principal closed the transaction

with the alleged incompetent, through its attorney, a highly esteemed member of the bar, who saw nothing which would arouse even a suspicion of the alleged incompetence.

We believe that Holt in 1910 was of the belief that Mrs. Christian was competent. On no other ground can one explain his subsequent conveyance with full covenants of warranty. He had, for years, been trying to purchase her interest for himself. He was on friendly terms with Mrs. Christian and her family group, and her interest had been for sale for years (R. 1018). If he had had any real doubt as to her competence, he certainly would have arranged for the appointment of a guardian. When testifying, Holt was forced to admit:

> "My cousin Mrs. Christian did marry and there was an annulment proceeding brought in respect of that marriage. I think I testified at that trial. I don't know whether I testified that Eliza was a bright girl, or words to that effect. I will not testify now or swear now that I didn't so testify at that trial.
>
> Although it is true that I testified for the defense in the annulment proceedings brought on behalf of Eliza Christian against Albert Christian, I can't positively state what I did say at those proceedings." (R. 1025)

The court records of that proceeding, except the decree, could not be found (R. 1341).

Holt admitted that he wrote to Mrs. Christian and received letters from her and the record shows that

he remitted money directly to her as late as April 28, 1919 (R. 1020-21). Furthermore, he joined with Mrs. Christian as a party to the 1905 lease (R. 890).

Nor did the Supreme Court of Hawaii find that Holt had any knowledge of Mrs. Christian's incompetence. It rejected all of his testimony and did not mention his name in its lengthy opinions.

Holt had an Adverse Interest to Waialua; He Actively Represented to it that Mrs. Christian was Competent; the Agency Rule Contended for by the Grantor is Inapplicable.

Counsel's citations support the general rule that an agent's knowledge will be imputed to his principal when such knowledge concerns a matter within the scope of his agency. The same cases also support an exception to that rule. Where the conduct or position of the agent is such as to raise a presumption that he would not communicate the facts to the principal, as where the agent is in reality acting in his own behalf or adversely to the principal or has a motive in concealing the facts from his principal, the knowledge of the agent will not be imputed to his principal.

Holt had three interests all adverse to Waialua: (a) He was anxious to acquire Mrs. Christian's interest so that he could dispose of it combined with his own—his interest standing alone being unsalable: (b) he was obligated to pay John D. Holt $150 a month, and he wanted to be relieved of that obligation; and (c) as is shown by the terms of the alleged agreement, he was indebted and wanted to secure funds to pay his obligation.

That these adverse interests were such as to induce him not to disclose any information that would interfere with the consummation of his purposed sale, is obvious. That he did not disclose such information but did everything possible to lead Waialua to believe Mrs. Christian was a competent and willing seller was found by the trial court (R. 134).

Under these circumstances knowledge is not imputed to the principal.

> "the principal is not charged with knowledge of his agent where the agent deals for himself with the principal, or where the agent's personal interests would be affected if facts known to him were known to his principal; or where he is more intent in furthering the interests of the opposite party than that of his principal."
>
> 3 *C. J. S.* 203, Sec. 269.

> "The rule that notice to an agent is notice to the principal is not one of universal application and it does not apply where the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal."
>
> 3 *C. J. S.* 196, Sec. 262.

There is also an exception to the exception to the effect that a principal will be deprived of the benefit of the exception if the agent is the sole representative of the principal in the transaction. See 3 *C. J. S.* 203, Sec. 269.

In *Curtis v. U. S.*, 262 U. S. 215, the case upon which chief reliance is placed by the grantor, the

court states the rule, the exception to the rule and then supports its opinion, if indeed it does not base its opinion, upon the exception to the exception. Chief Justice Taft states (p. 222) in speaking of the corporation: "It is charged with Holbrook's knowledge because he was the sole actor for the company in procuring the fraudulent patents": and then in distinguishing the case of *American Nat. Bank v. Miller*, 229 U. S. 517, which case was based upon the exception to the rule, the Chief Justice further states (p. 224): "If the case at bar Holbrook was the sole agent acting for the company in securing titles to land for it."

Here, assuming Holt was Waialua's agent, he was not a sole agent. Both Mr. Castle and Mr. Withington were acting for Waialua.

This is not the only distinction between the case at bar and *Curtis v. U. S.*, supra.

Counsel have set forth at length a written agreement between Holbrook, Collins and Curtis who were the prospective stockholders of the corporation in the *Curtis* case. Chief Justice Taft stated the lands in question were not secured pursuant to the written agreement, but pursuant to a subsequent oral agreement at which time the written agreeemnt had been fully executed.

The oral agreement provided that Holbrook was to acquire 30,000 acres of land under the Timber and Stone Act and deed it to the corporation at $10 per acre. Holbrook was a director, officer, manager and

large stockholder of the corporation. He was admittedly the agent of the corporation. Except for a period of one month, the frauds were committed after the corporation was formed and while Holbrook was its manager. During the entire period he had complete knowledge of the manner in which the land was being acquired. The only adverse interest that Holbrook had was that he was to make a personal profit on the deal. This interest was no more adverse than that of all agents who work for compensation. Even in the face of these facts the court found it necessary to rely upon the "sole actor" exception to the exception to the rule.[1]

The exception to the rule, as well as the basis for the rule, has been frequently stated:

In *American Nat. Bank v. Miller*, 229 U. S. 517, it is said (p. 522):

> "But if the fact of his (the agent's) own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only

1. In the *Curtis* case, so much relied on by counsel, the agreement of agency set out in the appendix to grantor's brief as a "deadly parallel" to the alleged agreement of April 15, does not furnish the basis of the finding of agency. Holbrook, as a stockholder, director, officer and manager of the corporation was admittedly its agent, as was abundantly proved by other evidence. Here the attempt is made to prove an "agency" by an unexecuted agreement, which is not corroborated by the other evidence, but is inconsistent with it.

did not disclose, but which he was interested in concealing."

In *American Surety Co. v. Pauly*, 170 U. S. 133, it is said (p. 156):

> "The presumption that the agent informed his principal * * * does not arise where the agent acts * * * to subserve simply his own personal ends or to commit some fraud against the principal."

See, also, *Maryland Casualty Co. v. Tulsa Industrial Loan and Inv. Co.*, 83 F.(2d) 14; *Fidelity & Deposit Co. v. People's Bank of Sanford*, 72 F.(2d) 932; *Schneider v. Thompson*, 58 F.(2d) 94.

In *United States v. Clark*, 138 F. 294, 301 affirmed 200 U. S. 601, the decision of the Circuit Court of Appeals was based upon facts which, even though much less favorable to the defendant than the facts in this case, are much more analogous to the case at bar than were the facts in the *Curtis* case. The court, after reviewing the circumstances surrounding certain absolute sales of timber lands by one Cobban to the defendant, said:

> "* * * Cobban and the appellee through his agents, commenced negotiations for additional lumber and timber lands. Cobban wanted the appellee to loan him money, bearing interest, with which to carry on his operations and to acquire additional lands, and to take as security his (Cobban's) deeds covering the lands, * * * That arrangement was agreed to by Cobban and the appellee, * * *. Subsequently, by agreement of the

respective parties, these mortgages were, for a money consideration, converted into absolute sales. While it is true that the record shows that the appellee knew that some of the money he loaned Cobban was intended to be used by him in acquiring additional lands, it does not show that the appellee knew, or had any reason to know, that he expected to acquire them fraudulently, or in any way unlawfully."

In affirming the decision, this Court said (p. 608):

"There is nothing sufficient to show that Clark had actual knowledge of the arrangement by which Cobban got the lands. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban and paid him the market price, and a substantial profit even on the government's calculations."

Even if Holt had been Waialua's agent and had known or believed that Mrs. Christian was incompetent, that knowledge would not be imputed to Waialua.

We have shown in our opening brief, pages 107 to 111, that under accepted principles, the guilty knowledge of an agent is not charged to his innocent principal, if, in reliance on the transaction the principal has materially changed his position so as to make it inequitable to impute the guilty agent's knowledge to him.

To what there appears, we add the following: We have already referred to Sections 263 and 274 of the

Restatement of the Law of Agency. We now refer also to Section 99, Comment c of that *Restatement*:

> "c. *Change of principal's situation.* The principal is under no duty to return things received as the result of an unauthorized act, if, before becoming aware of the facts, he receives title thereto as a bona fide purchaser, or he incorporates them in something from which they cannot be separated, or if they have become so mixed with his things that they are indistinguishable. Likewise, if the situation of the principal has so changed that it is inequitable to require their return under the changed conditions, their retention does not constitute an affirmance."

See:

Frey v. Dougherty, 286 Pa. 45;
W. W. Marshall & Co. v. Kirschbraun, 100 Neb. 876;
German-American State Bank v. Mutual Benefit Ass'n., 107 Neb. 124;
Johnson v. City Co., 78 F.(2d) 782, 786;
Czyrson v. Roseau County National Bank, 172 Minn. 420.

It follows, therefore, that since Waialua took without actual knowledge of incompetence, the great and irrevocable change of position done and suffered by it in the many years that followed, makes this a case where, in any event, the imputation of an agent's knowledge to the innocent principal would not justify rescission of what was done in good faith, for adequate consideration, in 1910.

The fact that Waialua took delivery of the deed before Holt acquired legal title does not charge Waialua with Holt's knowledge.

Counsel for Mrs. Christian seem to argue that Waialua is subject to the same equities to which it is argued Holt was subject, merely because Waialua took delivery of the deed from Mrs. Christian (Opening Br. p. 43). This, of course, is not true as a matter of law.

We have already supported the propositions (a) that Holt made no profit, secret or other, in his purchase, and resale to Waialua, of Mrs. Christian's contingent interest; and (b) that he in fact believed her competent.

We now point out that in any event, one who acquires an equitable interest from a party against whom defenses would lie, takes free of those defenses if, as here, he later acquires the legal title in good faith for value without notice of the facts giving rise to the defenses against his transferor.[1]

The fact is, indeed, that Waialua is within the class of subsequent bona fide purchasers for value, under the deed of 1910. As we have seen, long before the execution of the deed, Holt had accepted an offer of Mrs.

---

1. *Ames, Lectures on Legal History,* 254;
2 *Tiffany on Real Property,* 2173;
4 *Bogert on Trusts,* 2560;
Pomeroy, Equity Jurisprudence, (4th ed.) §§417, 740;
Boone v. Chiles, 10 Peters, 177, 210;
Fitzsimmons v. Ogden, 7 Cranch 2, 18;
United States v. Clark, 200 U. S. 601, 607.

Christian's interest for $30,000 (R. 926). It is apparent that Kentwell, who made the offer on behalf of Mrs. Christian, was her authorized agent to sell. Moreover, her own later performance of the contract was necessarily a ratification thereof.

The authority of an agent to sell real property did not have to be in writing, either in Hawaii or in England. *Takahâshi v. Kualu* (1905), 17 Haw. 87, 89; *Coles v. Trecothick*, 9 Ves. Jr. 250; *Heard v. Pilley*, L. R. 4 Ch. 548.

This is apparently the universal rule where the statute does not expressly require the agent's authority to be in writing. 2 *Williston on Contracts* (Rev. ed.) 1406.

The Hawaiian statute did not require the agent's authority to be in writing in 1910. (*Rev. Laws of Hawaii*, 1915, Sec. 2659), although it does now, by virtue of an amendment in 1923 (*Laws*, 1923, c. 5, sec. 1).

Moreover, whether or not Holt had a contract with Mrs. Christian, and assuming that if he did it was voidable, even so, the rule that a purchaser is protected if he acquires the legal title in good faith for value without notice, applies whether or not his intermediate transferor had and transferred a completed enforceable equity. (See the authorities cited above.

A *fortiori*, Holt's alleged knowledge and misconduct (both of which, we submit, are non-existent) are not available against Waialua.

(3) Arguments based on the contention tha. Mrs. Christian did not receive the consideration for the deed of 1910 are without merit.

This argument of the grantor, which is based on the contention that Mrs. Christian did not receive the sum paid by Waialua, is fully answered in our opening brief in No. 15, at pages 113 to 117.

(4) The argument that this cause is governed by a "rule of decision in the Federal Courts" that the deed of an incompetent is void, is unsound.

Here counsel again present their claim that there is a "rule of decision in the federal courts" to the effect that the deed of an incompetent is void: that this rule governs this cause: and as a result, Waialua, although it acted in good faith, is entitled to neither a return of the consideration nor compensation for improvements, if the deed is cancelled.

We have already pointed out in our opening brief that there is no such rule prevailing in the federal courts as counsel contends for. We have also demonstrated, we submit, that if there was such a rule, it would not govern this cause for the law to be applied here is the law of the Territory of Hawaii and not any so-called "Federal Rule".

The argument is alluring to counsel, of course, because it would entitle the grantor to a decree of cancellation automatically[1], eliminating all questions

1. This in substance is what the Circuit Court of Appeals did when it held that it would not "balance all of the equities of the parties" (R. 1600).

mation of the deed to the Waialua Agricultural Company. My interest in acquiring the one-third belonging to my cousin Eliza Christian was the fact that I wanted control of it without somebody from the outside getting hold of it. Around the latter part of 1909 Mr. Castle told me he did not want to buy my one-third, but that he wanted to buy a two-thirds interest, as I remember.

"I knew from my correspondence with Mr. Kentwell that as far back as 1908 they were trying to dispose of the Eliza Christian interest, always writing back here to see what they could get." (R. 1017)

Although Kentwell and Mrs. Christian knew at all times that Holt expected to sell Mrs. Christian's interest, after he had purchased it, together with his own, to Waialua, it is equally clear that at all times Holt was dealt with as the purchaser.

On February 17, 1910, Holt wrote Kentwell asking them to "contract" with him; that "this offer I make you now is final", and that if Mrs. Christian survives her father she "may be able to get more for her share than this amount I offer." (R. 914)

On March 30, 1910, Kentwell wrote Holt saying "I assume the offer we made is satisfactory to you" and "We want to stand by you and you must act at once." (R. 919)

After the purchase had been agreed to and Mr. Withington left for England, Holt cabled Kentwell to have the conveyance executed to him, to which Kentwell replied on April 29 that this was agreeable

(R. 942). Thus Holt made sure up to the last moment that title would vest in him.

The Alleged Agreement of April 15, if Executed, Would Not Have Created an Agency.

The alleged agreement of April 15, if it had been executed, would not have created an agency relationship but would have evidenced the independent contract of Holt with Waialua—under which he agreed to sell a 2/3 interest (of which he then owned the greater part), provided he acquired the other outstanding interests pursuant to his contract. Under it he would be acting for himself and not for Waialua.

Under the agreement, the two-thirds interest was to be conveyed by Holt and Colburn by a warranty deed (R. 951). Would an "agent" employed to acquire real estate for his "principal" agree to first purchase the property on his own account and then convey it to his "principal" by a deed containing full warranties?

Under the agreement, both Holt and Colburn were to be bound, if, within one year, they could not convey by warranty deed a full two-thirds interest, to refund with interest all money advanced by the buyer to aid in the acquisition of the outstanding interest. It is a peculiar sort of "agency" where the agent must expend time and money on the business of the principal but who, if he cannot himself convey title by warranty deed within a limited period of time, must bear the entire cost and expense of the transaction.

instructions to permit the grantor, if it desired, by suitable amendments, to put in issue the validity of the 1905 lease and 1906 contract, "in so far as it may be affected by the mental condition of" Mrs. Christian (R. 327).

The grantor accordingly amended the pleadings challenging the lease and contract, and issue was joined with Waialua denying that Mrs. Christian was incompetent when they were executed. At the trial Waialua offered oral and documentary evidence on this issue, but on the objection of Mrs. Christian's attorneys the trial court excluded such evidence, ruling that this issue was no longer open (R. 1466). The trial court made its decision on remand cancelling the 1905 lease and 1906 contract, in 1932.

On appeal, the Supreme Court of Hawaii in 1934 held that the trial court in excluding evidence as to Mrs. Christian's mental condition in 1905 and 1906 had correctly construed its order of remand but that such evidence should have been admitted, stating:

> "As expressly held in the former opinion, neither the lease of 1905 nor the instrument of 1906 was a subject of contention between the parties at the original trial. * * * both parties expressly represented to the court and to each other in their pleadings that that lease was not in issue. * * * There may be, on the part of the members of the court who examined the evidence on the original trial, a temptation to believe that in spite of any new evidence to be adduced their conclusion concerning the degree of Eliza's imbecility would not be affected thereby. Nevertheless

the court should not venture any such surmise" (R. 553-554).

The Supreme Court of Hawaii, however, held that this error was not prejudicial because, assuming that Mrs. Christian was incompetent when the 1905 lease and 1906 contract were made, for the reasons stated in the court's opinion, they nevertheless should not be cancelled (R. 555, et seq.) and so decreed.

In short, the Supreme Court of Hawaii considered the question at great length, and after pointing out that Waialua was entitled to show a change in Mrs. Christian's condition between 1905 and 1910, held that if her incompetency in 1905 was relevant that issue would have to be tried.

The Circuit Court of Appeals agreed (R. 1609) and having held that an incompetent's conveyance is void, held that the question whether Mrs. Christian was incompetent in 1905 and 1906 must be tried; and remanded the case for this purpose.

Counsel invoke the doctrine of the law of the case. Obviously it has no bearing for the decree of the Supreme Court of Hawaii on the first appeal was interlocutory only, as the Circuit Court of Appeals held when it dismissed an appeal therefrom (52 F.(2d) 847). The Supreme Court of Hawaii therefore retained full jurisdiction of the cause when it heard it on the second appeal and if it wished could have entirely reversed its decision on the first appeal. There can be no question of its power to correct the error made by it in its first order of remand.

The Supreme Court of Hawaii in this case, was an intermediate appellate court, since the amount in controversy brought the cause within the jurisdiction of the Circuit Court of Appeals. Being an intermediate appellate court the Supreme Court of Hawaii could at any time prior to the entry of final decree, correct any error in any interlocutory order. The doctrine of the law of the case has no application whatsoever, as the Supreme Court of Hawaii itself has held.

Rosenbledt v. Wodehouse, 25 Haw. 561;
Sumitomo Bank v. Hawaii Nosan, 26 Haw. 517, 535:

"The effect of the foregoing is to overrule the former opinion in this case. It would also seem to disregard the rule of 'the law of the case' * * * The rule of the law of the case at best is not applicable in cases such as this where the amount involved, exclusive of costs, exceeds $5,000."

Indeed, this Court itself has ruled that the Supreme Court of Hawaii, as an intermediate appellate court, is free to reverse or modify its former opinions at any time prior to final decree.

Kapiolani Estate v. Atcherley, 238 U. S. 119, 136;
Lewers & Cooke v. Atcherley, 222 U. S. 283, 295.

THE FACTS HAVE BEEN FULLY FOUND BELOW. THIS COURT MAY DISPOSE FINALLY OF THE CASE BY ORDERING THAT THE BILL BE DISMISSED.

This suit was first tried in 1929. It has been heard five times in three courts. The facts and their significance have been dealt with to the point of exhaustion, in five lengthy opinions.

It clearly appears, we submit, that Mrs. Christian has not made out a case; that on the contrary, it has been shown, on several independent grounds, that the titles sought to be annulled should not be disturbed.

We respectfully urge, therefore, that on reversal, this Court should order that the bill be dismissed, thus putting an end to the proceeding.

The Lease of 1905 and the Assignment of 1906.

The court below clearly erred in reversing the judgment of the Supreme Court of Hawaii that the lease of 1905 and the assignment of 1906 should not be disturbed. The reasoning and decision of the Supreme Court of Hawaii on this question sustains itself without argument. For convenience, we again quote briefly from that court's opinion:

> "This lease was for an adequate consideration. All its terms were fair and reasonable * * * It has been fully performed. It was in the best interests of Eliza and beneficial to her * * * The imbecility of the lessor did not enter into the transaction. Under these circumstances we can see no equity or justice in canceling the lease (R. 558) * * * even though the lessee can be restored to the status quo ante." (R. 560)

The vital part of the discussion by the Supreme Court of Hawaii of the assignment of 1906 appears in the record, at pages 572 to 575. The court said in part:

> "When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza. In our opinion the deed from Annie Kentwell, a competent person, to the W. A. Co., did operate transfer to the company the right which Annie had secured from Eliza by the assignment of 1906." (R. 575)

The Circuit Court of Appeals in decreeing that the 1905 lease be cancelled if Mrs. Christian was incompetent when she executed it, overruled the Supreme Court of Hawaii without so much as discussing or considering the grounds or reasoning upon which that court based its decision. This action seems unsupportable on any view of the law or the facts, save the adoption by the court below of the so-called "Federal Rule" that the deed of an incompetent is a nullity, which rule the Supreme Court of Hawaii rejected[1] as a rule for the Territory.

It is apparent, we submit, that no imaginable ground would justify disturbance of the judgment of the Supreme Court of Hawaii that the lease of 1905 and the assignment of 1906 are valid and unassailable.

---

1. Compare: *Kapiolani Estate v. Atcherely*, 238 U. S. 119, 136;
Compañia General De Tobacos v. Collector, 273 U. S. 306, 310.

The Deed of 1910.

It is shown, we submit, beyond question that as found by the Supreme Court of Hawaii and the court below, Waialua received the deed of May 2, 1910 in good faith, without knowledge of the grantor's alleged incompetence, for an adequate consideration.

And we have demonstrated, we believe, that in the many years that intervened between the execution of the deed and the commencement of this suit, Waialua has so irrevocably changed its position in reliance on its title that restoration of Waialua to *status quo* is wholly impossible, so that cancellation of the deed, in an action brought 18 years after its execution, would work a grave and wholly inexcusable injustice upon the innocent grantee.

To be sure, the Supreme Court of Hawaii held that the deed should be cancelled; but this decision, we submit, rests upon two errors of law, both of which were, in the court's opinion, necessary to the decision:

1. That court held that Waialua was restored to status quo by the provisions of its decree designed to give Waialua the continued use of its physical improvements.[1] The utter inadequacy of this attempt to

1. Under the decree which the Supreme Court of Hawaii believed restored Waialua to status quo, (1) the lease of 1905 was held valid, (2) the contract of 1906 was held valid as an assignment of rent for Mrs. Christian's life, (3) Waialua was given all the improvements, and (4) the purchase price was returned. Waialua thus received the purchase price, the improvements, and the use of the property for Mrs. Christian's life, without rental. All of these,

restore status quo has, we believe, been abundantly shown. It utterly ignores and does not mention, that Waialua purchased a contingent interest, bore the risk for 12 years, improved the property as its owner for years thereafter, and is now being called upon to convey to Mrs. Christian a vested fee. In addition it takes no account of the many intangible changes of position made and suffered by Waialua during the many years that intervened; of the countless decisions that have been made in reliance on the title, the many steps that have been taken once and for all which would have been very different except for the grantee's justified belief that the deed in question was valid; of the countless changes of external events which make it now wholly impossible to go back to the state of affairs in 1910; of the numerous risks assumed by Waialua in the purchase of the various interests and the development of its large and unified enterprise; in short, it fails to take account of anything except the physical improvements made by Waialua. And indeed, it ignores many of these, e.g. the conversion by Waialua of a desert waste into a profitable plantation. This whole matter has been adequately dealt with in our opening brief and in our petition and supporting brief. The Supreme Court of Hawaii expressly held that unless Waialua could be restored to status quo, the deed should not be cancelled (R. 293-294).

---

together, (the court thought) restored status quo. The Circuit Court of Appeals, while adopting the Supreme Court of Hawaii's findings that status quo could be restored, entirely abandoned the basis of its decision.

2. The second error of the Supreme Court of Hawaii was its holding that the deed of 1910 was not beneficial to Mrs. Christian.

As we have seen, the Supreme Court of Hawaii held that the deed of an incompetent will not be set aside (even though status quo can be restored), as against a purchaser without knowledge of the incompetence for adequate consideration, if it can also be said that the execution of the deed was "beneficial" to the incompetent. And although the court found that Waialua purchased in good faith, without knowledge of the incompetence for an adequate consideration, it concluded that the 1910 transaction was not "beneficial" to Mrs. Christian. The court stated this conclusion as follows:

> "She was then living with her father and the Kentwells at the home of the latter in Oxford. Her life, because of her imbecile condition, was very restricted and her wants were accordingly simple. There was no necessity for her to have more than enough money to supply them. Annie Kentwell, by the instrument of August 31, 1906, to which we have already referred, had undertaken to support Eliza during her life. She was in no danger, therefore, of becoming a public charge or of not being supplied with the things necessary to her sustenance and comfort. In her circumstances it would clearly be the part of wisdom to hold on to her contingent interest when by doing so she might eventually become owner of a vested and more valuable interest." (R. 303)

The ultimate basis of the court's decision to cancel the 1910 deed was therefore its belief that under the contract of 1906 she was assured of support for life. The Circuit Court of Appeals, not only construed the contract of 1906 to be nothing more than an assignment of the rentals under the 1905 lease, which expired in 1930 (as contrasted from the Supreme Court of Hawaii's holding that it assigned all rentals to become due her during her life), but it also decreed that the 1906 contract should be cancelled if Mrs. Christian was incompetent when she executed it. The Circuit Court of Appeals thus destroyed the very basis of the Supreme Court of Hawaii's decision. That court pointed out in the second appeal that its decision in the first appeal cancelling the 1910 deed had been based on the support guaranteed Mrs. Christian by the 1906 contract, and in upholding the validity of that contract as an assignment of rentals for life pointed out:

> "But if she had not had those assurances of money and support from her lease of 1905 and her assignment of 1906, the effect on the deed of 1910 might conceivably have been different. That cannot be decided now." (R. 572)

This is to say, in effect, that if the court believed the 1905 lease and 1906 contract not to be binding, it would not have cancelled the 1910 deed. And yet the Circuit Court of Appeals has directed the cancellation of both of these instruments.

The surrounding circumstances clearly show, we submit, that the sale by Mrs. Christian of her con-

tingent interest was an entirely prudent and business-like transaction, for the following reasons:

1. It must be remembered that Mrs. Christian's interest was a contingent remainder, dependent upon her surviving her father (who in fact lived for twelve years thereafter), and upon her surviving him as his sole heir. The substantial nature of the risk attending these contingencies is adequately described by the Supreme Court of Hawaii (R. 304-5) in the part of its opinion wherein the court holds that the consideration was adequate. It is, we submit, apparent that it was not only prudent but eminently wise for a woman in her position to exchange this future contingency for a present and certain sum, expressly found to be equal to its full value.

2. The court's reasoning amounts to the proposition that since her daily wants were provided for, she should have chosen to speculate on the happening of the contingencies; that if she had had $30,000 at the time, it would have been unwise not to invest it in this speculative future contingency.

3. The court's statement that in 1910 she did not have any need or use of $30,000 is purely gratuitous. Although her living was provided for life, we have no knowledge whatever on the question whether she then had reasons for wanting to realize on her contingent remainder; and, if so, what those reasons were.

4. The wisdom of the sale by Mrs. Christian of her contingent remainder in 1910 is attested by the fact that contemporaneously, James L. Holt, whose busi-

of good faith, adequacy of consideration, and restoration to status quo, and because its application would deprive Waialua as an innocent purchaser of the restoration of the money it paid in good faith and the hundreds of thousands of dollars which it spent in reliance on the integrity of the instruments. Carried to its logical conclusion, it would mean that the grantor need not have resorted to a court of equity at all but could have recovered the property by an action in ejectment.

The Circuit Court of Appeals, sitting as an appellate court for Hawaii, had not only the right but the duty to declare the law. This does not mean, however, that that court may fasten on the Territory of Hawaii a rule of law contrary to the unanimous authority of common law jurisdictions. Nor does it mean that the court may ignore a local statute,[1] which makes "the common law of England, as ascertained by English and American decisions * * *" the law of Hawaii.

(C) COUNSEL'S CLAIM THAT THE DECISION OF THE SUPREME COURT OF HAWAII ON INCOMPETENCE IN THE FIRST APPEAL IS THE LAW OF THE CASE IS WITHOUT MERIT.

Counsel, having urged that an incompetent's conveyance is void, argue that the cause should not be remanded for trial of the issue of competence in 1905 and 1906 on the ground that on the first appeal, the Supreme Court of Hawaii held that no trial of

---

1. *Revised Laws of Hawaii*, 1935, Sec. 1.

that issue was necessary; and that ruling (counsel argue) is the law of the case.

In view of the fact that the argument is both clearly unsound and (in our view of the case) irrelevant, we would not discuss it except that it necessarily implies the further argument that the court's decision on the first appeal is the law of the case on all points there decided. In these circumstances we are impelled to point out its unsoundness, and in this behalf to trace the history of the issues involved.

Preliminarily, we point out that this litigation has been prolonged over a period of ten years, primarily because of the grantor's failure to present all of the issues to the court when the cause was first tried.

This suit was filed in 1928. It attacked only the 1910 deed. When the Supreme Court of Hawaii decided the first appeal in 1931, while it decreed the cancellation of the 1910 deed, it pointed out that "by the pleadings in this case the validity of the lease was expressly excluded from the issues and therefore could not properly have been adjudicated by the court below and cannot be adjudicated by this court" (R. 312) and pointing out that "if the deed fell the Waialua Company had a perfect right to claim that its possession was justified by the lease" (R. 314) and the deed of 1910 being invalid "the Waialua Company's rights under the lease remain unaffected until it is cancelled" (R. 318). It also held that whether the 1906 contract should be set aside "is not within the issues presented by the pleadings" (R. 323). The court therefore remanded the cause to the trial court with

ness acumen is not questioned, was in the process of selling a similar[1] contingent remainder owned by him; and by the further fact that Mrs. Kentwell, by the very deed here in question, sold her contingent right to future rents, which depended upon the same contingencies that governed Mrs. Christian's remainder.

5. Mrs. Christian could not receive any benefit from her ownership of the contingent remainder for at least twenty years after 1910, even though it should vest within that time, for, even under the narrow construction of the 1906 contract adopted by the court below, she had assigned her contingent right to receive rents under the lease of 1905, which lease was not to expire until 1930.

6. Either before or very shortly after the deed of 1910, numerous relatives of Mrs. Christian sold their various interests in the same property.

7. It is not disputed that the deed of 1910 was executed by Mrs. Christian after consultation with her father, her cousin Annie Kentwell, and the latter's husband, Lawrence Kentwell, a sale having been contemplated and under discussion for more than a year. (R. 1018) The only one of these three who testified in this case is Mrs. Kentwell. Mrs. Christian's father was

---

1. James L. Holt had a contingent remainder in 1/4 (his brother's interest which he had purchased, and his own), which depended on two lives instead of one, and was therefore more valuable than Mrs. Christian's interest. Holt's father died in 1916, while Mrs. Christian's father lived until 1922.

dead, and Lawrence Kentwell was not called. Although Mrs. Kentwell (the "guardian") now protests that she acted in bad faith, her testimony is discredited by both the trial court and the Supreme Court of Hawaii; and there is no intimation in the record that either of the other two were faithless advisors.

Lawrence Kentwell had for many years managed not only his own business affairs but those of his wife, Mrs. Christian's father, and Mrs. Christian herself. He was a man of considerable business experience, and a trained lawyer, as noted by the Supreme Court of Hawaii (R. 302). There is not a word of evidence in the record which even suggests that his advice to Mrs. Christian concerning the deed of 1910 did not represent his best judgment.

In the face of these circumstances, we submit that there is no ground whatever for concluding, even in retrospect, that the conveyance by Mrs. Christian in 1910 was not beneficial to her.

We submit, moreover, that there is no justification for holding that in order to be immune against attack, the transaction must, upon a delicate weighing of all aspects of the grantor's circumstances, be found in retrospect to have been "beneficial" to the grantor.

Finally, we submit that in any event, the finding that the consideration was adequate, namely, that what Mrs. Christian got was equal in value to what she gave, is alone conclusive of the question.

This leaves only the proposition that in retrospect, Mrs. Christian would have profited more by retaining

her future contingent interest, and that this alone is a sufficient ground upon which to set aside the deed, notwithstanding the great and irreparable harm that will thereby be inflicted on the innocent grantee.

We do not believe that this Court will accept and approve this proposition either as a matter of fact or a matter of law. It must do so in order to hold that it was not error for the court to place its decision upon this ground.

CONCLUSION

The grantor has shown no basis for the cancellation of the 1905 lease and the 1906 contract; and these instruments, which were upheld by the Supreme Court of Hawaii, should not be cancelled under any view of the law or facts. The real issue here is the error of the Circuit Court of Appeals in cancelling the deed of 1910. We submit that, for the reasons stated, this court should reverse the decree of the court below and direct the dismissal of the bill.

Respectfully submitted,

HERMAN PHLEGER,
MAURICE E. HARRISON,
GARNER ANTHONY,
Counsel for
Waialua Agricultural Company, Ltd.

ROBERTSON, CASTLE AND ANTHONY,
BROBECK, PHLEGER & HARRISON,
EVAN HAYNES,
Of Counsel.

Dated, San Francisco, California,
September 30, 1938.